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TESTIMONY IN SUPPORT OF SJR 61

SJR 61 proposes a constitutional amendment that would require governors to veto separate "sections" of an appropriation bill in their entirety. While I believe it would be preferable to require that governors veto separate "items" in their entirety – and I urge you to consider that alternative – I support the proposed amendment, because it would make it much more difficult for governors to use the partial veto power to create laws that the legislature did not approve.

**I. The Need for the Amendment: To Restore the Right of the People
To Make Their Own Laws**

The United States was founded on the premise that the people have an inherent or inalienable right to give or withhold their consent to the making of any law that provides for spending money, imposing taxes, or establishing a rule of conduct. That is why the Constitution of the United States vests "all legislative powers" in the Congress and the Wisconsin Constitution vests "the legislative power" in the Senate and the Assembly. These grants of power reflect an understanding that it is the constitutional function of the legislative branch of government to authorize the making of each and every law.

The Founders of our nation, and of our state, viewed *authorization by the people* as the first line of defense against abuses of government power. That is what they meant when they declared, both in the Declaration of Independence, and in the Wisconsin Declaration of Rights, that governments derive "their just powers from the consent of the governed." They understood that it was the function of the legislature to give or withhold that consent.

But Wisconsin has lost sight of why we have a legislature. The idea that the people have a fundamental right to make their own laws is the idea that gave birth to our nation in 1776. It lies at the foundation of our society. It explains why we have the legislative process that is prescribed in the state Constitution. But it is no longer an operative idea in this State, whenever a governor decides to use his partial veto power to create a law that the legislature did not approve.

For nearly 35 years, we have accepted the indefensible notion that governors may use the partial veto power to create laws that the legislature has not approved. And we have done so, despite the fact that the Wisconsin Constitution still vests "the legislative power" in the Senate and the Assembly, despite the fact that it provides for "all laws of the state" to be approved "by the people of the state of Wisconsin, represented in senate and assembly," and despite the fact that it uses the word "approve" to define the scope of the governor's power (and the dictionary definition of that word is "to judge and find acceptable").

The amendment proposed by SJR 61 would go a long way toward restoring the fundamental right of the people to approve or reject the laws under which they must live, through their representatives in the Senate and the Assembly. It would do this by eliminating the ability of governors to delete selected words, digits and punctuation marks from sentences, paragraphs and sections of bills, for the purpose of fabricating legislation that the legislature did not authorize to become a law.

II. The Potential for Abuses of Power: Why Would Any Corporation or Business Invest in Creating Jobs in the State of Wisconsin As Long As Such A Potential Exists?

Governors are currently permitted to exercise part of "the legislative power" that the Wisconsin Constitution vests in the Senate and the Assembly *whenever* the legislature proposes to amend *any* existing appropriation, tax, fee, or cap on borrowing authority. The potential for unilateral exercises of "the legislative power" by a governor is particularly dangerous in the context of appropriations and taxation, because the partial veto power may be used to create mandates for spending billions of dollars that the legislature did not authorize to be spent, and to impose confiscatory taxes that the legislature did not authorize to be collected.

A large part of the potential for such abuse lies in the fact that a legislative proposal to amend a tax rate or an appropriation amount may be printed in an appropriation bill alongside the numbers that appear in an existing law. As a result of the current understanding of the partial veto power, it has become accepted that governors may use vetoes of digits and punctuation marks to create any combination of numbers from those set forth in existing law and the amendment that may better suit his policies, preferences or whims.

A. The Potential for a Confiscatory Corporate Income Tax

Let me give you a graphic example. Suppose that the Legislature proposes to reduce the Wisconsin corporate income tax, from the current rate of "7.9%" prescribed in Section 71.27 of the statutes, to a lower rate of "6.7%". If such an amendment is proposed, the existing rate would be printed in the bill with a line struck through it to indicate that it is to be repealed, and the proposed amendment would be printed immediately after it, and underlined, to indicate what would be substituted if the amendment is adopted.

As a result of the juxtaposition of the old and the new, and the current understanding that governors may use their partial veto power to delete any "part" of a single sentence, the governor would have a number of options to increase the corporate income tax rate. He could unilaterally set the tax rate at 9% by vetoing the proposed amendment in its entirety, and by vetoing repeal of the "9%" in existing law. He could set the tax rate at 79% by vetoing the amendment and vetoing repeal of all but the decimal in the existing law. Or he could set the tax rate at a confiscatory rate of more than 90% by vetoing repeal of the number "9" in the existing law, and approving a digit and the percentage sign in the proposed amendment.

B. The Potential for a Confiscatory Individual Income Tax

The 2009-2011 State Budget created a new income tax rate of 7.75 percent on all taxable income exceeding \$150,000 that will appear in Section 71.06 (2) (h) 5 of the Wisconsin Statutes. A governor could use the same technique that is illustrated in the previous example to create a confiscatory tax of 75 percent or 77 percent on income, simply by vetoing a proposed amendment in its entirety, and by vetoing repeal of the digits necessary to create a higher tax rate.

It may not be likely that a governor would use the veto power to create confiscatory tax increases. But there is no constitutional barrier to prevent a governor from doing so.

Under these circumstances, the legislature cannot propose to amend any existing tax, appropriation, fee or cap on borrowing authority without creating a risk that a governor will take the opportunity to create law that the legislature did not consider, let alone enact. And no corporation or business can invest money in the creation of jobs in this State, without taking the risk that a governor may seize the opportunity to subject it to a confiscatory tax or some other provision of law that it might regard as punitive or unfair.

C. An Example That Proves the Point: A Unilateral Increase in a Cap on Borrowing a Unilateral Increase in an Appropriation

Thus far, I have presented hypothetical examples of what could be done. However, if you are skeptical about the potential for such lawmaking by the executive, take a look at the Governor Doyle's veto of section 683d of 2003 Wisconsin Act 33. The legislature proposed to reduce the cap on bonding authority for major highway projects from \$140 million under existing law, to a total of just \$100 million. The Governor vetoed repeal of the dollar sign, and a "1" and a "0" from the existing law, vetoed the dollar sign and the "1" in the proposed amendment, and combined the dollar sign, the "1" and "the "0" from the existing law, with "00,000,000" from the proposed amendment, in order to create a billion dollars of bonding authority that the legislature did not authorize! In the alternative, the Governor could have created borrowing authority of more than \$1 trillion, simply by vetoing the repeal of an additional "000" from the existing law, and adding that "000" to combination of numbers that he used to fabricate \$1 billion of bonding authority.

D. Another Example That Proves the Point: A Unilateral Increase in an Appropriation

An appropriation is defined as "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government *are authorized* to use that money, and no more, for that object, and no other." (emphasis added). Flynn v. Department of Administration, 216 Wis. 2d 520, 556 (1998). This definition is based on the premise that it is the function of the legislature, and of the legislature alone, to authorize the amount of money that may be spent for a specified object.

Yet, Governor Doyle's veto of section 166d of 2005 Act 25 used the technique of combining parts of existing law with parts of a proposed amendment to create a different number

that, in the words of the governor's veto message, was "\$8 million above the amount provided by the Legislature." The higher number was created by: (a) vetoing repeal of the dollar sign, a "4" and a "5", and a comma from an existing appropriation; (b) vetoing "\$37" and a comma from the proposed amendment; and (c) approving enactment of the numbers "057,200" in the remainder of the amendment. The result was an appropriation amount of \$45,057,200 that the legislature plainly did not authorize, instead of the lower amount of \$37,057,200 that was contained in bill that the legislature presented to the governor for his "approval."

E. Additional Examples: Two Appropriations – Created By Vetoes – That Have Led to \$14 Billion of Spending

Governors have used other techniques to create mandates for the spending of funds that the legislature did not authorize to be spent. For example, Governor Thompson vetoed a single sentence of section 2135t of 1991 Wisconsin Act 39 to create an annual appropriation of \$319,305,000 for a school tax credit that the legislature did not approve. The veto led to the spending of more than a billion dollars that the legislature did not authorize to be spent before the provision was re-enacted as part of 1995 Wisconsin Act 27 with a higher appropriation. An additional 7 billion dollars has been spent since that time, but under circumstances where the school tax credit could not be repealed without the consent of the governor. As a result, there is a total of more than \$8 billion that might not have been spent for the "specified object," without an executive power to veto less than an entire section of an appropriation bill.

Another example of how the partial veto power may be used to create mandates for spending that the legislature occurred in 2003. Governor Doyle used partial vetoes to combine parts of different sentences in section 1669d of 2003 Wisconsin Act 33 to create an annual appropriation of \$703,102,200 for aid to municipalities. The appropriation was subsequently re-enacted in Section 1706 of 2005 Wisconsin Act 25 at a reduced amount of \$702,483,300, but again, under circumstances where the appropriation could not be repealed without the consent of the governor. The 2003 veto has led to more than \$6 billion in spending that might not have been spent for the "specified object" of that municipal aid program, but for the fact that governors have been permitted to veto less than an entire section of an appropriation bill..

F. Conclusion With Respect to SJR 61

SJR 61 would prevent governors from exercising "legislative power," without the approval of the legislature, by requiring that governors reject nothing less than an "entire bill section." This would be an important step toward restoring the proper authority of the legislature.

However, I believe it would be preferable to require that separate "items" be vetoed in their entirety, as the sponsors of the partial veto power intended in 1930. An "item" may consist of one or more "sections" that the legislature may adopt as an integrated whole to deal with a particular subject. Governor Doyle has vetoed about 400 separate "items," with 60% dealing 2 or more related sections, and 32% dealing with 4 or more related sections. Thus, a "section" veto could create law without legislative approval. In addition, the Washington Supreme Court has made clear that the courts may not defer to the legislature's designation of "sections" in a bill.

ALTERNATIVE PROPOSAL FOR AN "ITEM" VETO

Resolved by the senate, the assembly concurring, That:

Section 1. Section 10(1)(c) of Article V of the constitution is amended to read:

Section 10(1) (c). In approving an appropriation bill in part, the governor may reject one or more distinct items, but each such item must be rejected in its entirety, so that any item the governor may approve shall be one that the legislature authorized in identical terms at the time it passed the bill.

Section 2. Section 10(1)(d) of Article V of the constitution is created to read:

Section 10(1)(d) An item is a part of an appropriation bill that: (1) is composed of one or more sections of the bill that the legislature adopted as an integrated whole to deal with a distinct policy, program, topic or subject-matter; and (2) is sufficiently distinct in itself that it may be removed from the bill without affecting any other item or items that the governor may approve.

Explanatory Note: The definition of an "item" is based, in part, on Virginia v. Dodson, 11 SE 2d 120, 124 (1940). In that case, the Virginia Supreme Court defined an "item" as "something that may be taken out of the bill without affecting its other purposes or provisions . . . [with] no damage . . . done to the surrounding legislative tissue." The language of the Virginia Constitution specified that a governor's veto of any item or items "shall not affect the item or items to which he does not object."

For more information:

Attachment B: Two Examples of Single Sentence Vetoes

Attachment C: Brief in Support of the 1930 Amendment by Drafter Edwin Witte

Frederick B. Wade, "The Origin and Evolution of Partial Veto Power," Wisconsin Lawyer (Mar. 2008) available on line at www.wisbar.org.

TWO EXAMPLES OF SINGLE SENTENCE VETOES

Section 2m of 1999 Act 10 created an income tax increase of \$234 million that the legislature did not authorize by repealing the property tax rent credit:

SECTION 2m. 71.07 (9) (b) 4. of the statutes is created to read:

71.07 (9) (b) 4. For taxable years beginning after
Vetoed December 31, 1998 ~~that the amount of the credit may not exceed~~ subject
In Part to the limitations under this subsection a claimant may
claim as a credit against, but not to exceed the amount of,
Vetoed taxes under s. 71.02, 8.4% of the first \$~~400~~0 of property
In Part taxes or rent constituting property taxes, or 8.4% of the
Vetoed first \$~~400~~0 of property taxes or rent constituting prop-
In Part erty taxes of a married person filing separately.

Section 683d of 2003 Act 33 created \$1 billion of bonding authority for major highway projects, when legislature had proposed a reduction from \$140 million under existing law to \$100 million:

SECTION 683d. 20.866 (2) (uum) of the statutes is amended to read:

20.866 (2) (uum) *Transportation; major highway and rehabilitation projects.* From the capital improvement fund, a sum sufficient for the department of transportation to fund major highway and rehabilitation projects, as provided under s. 84.555. The state may
Vetoed contract public debt in an amount not to exceed
In Part ~~\$140,000,000~~ \$100,000,000 for this purpose.

The same technique could be used to increase spending, taxation or bonding authority if the legislature decides to propose an amendment to any existing appropriation, tax or cap on borrowing. In addition, although different techniques were employed, section 2135t of 1991 Act 39 created an annual appropriation of \$319,305,000 from a single sentence that the legislature did not authorize, or \$1.28 billion over four years before it was amended. Section 1669d of 2003 Act 33 created another annual appropriation of \$703,102,200 that the legislature did not authorize by combining parts of two sentences.

APPENDIX A.

BRIEF IN SUPPORT OF THE PROPOSED AMENDMENT TO THE CONSTITUTION TO ALLOW THE GOVERNOR TO VETO ITEMS IN APPROPRIATION BILLS.

By

Edwin E. Witte, Chief, Wisconsin Legislative Reference Library, Sept. 1930.

(1) *The governor's veto of items in appropriation bills is an essential part of an executive budget system.* The last legislature, in response to an insistent public demand, completely overhauled the budget system of the state. It adopted the executive budget plan, which centers responsibility for appropriations and expenditures in the governor of the state. The governor now alone is responsible for the budget estimates submitted to the legislature. These are incorporated in a single appropriation bill, so that both the legislature and the public may know the total of the state's appropriations, in comparison with the estimated receipts. After appropriations are made they cannot be expended, except as released by the governor or the budget director, a subordinate of the governor. But in the appropriation stage itself the governor has little power. While the governor prepares the original budget bill, the legislature can increase the items therein and add

new ones thereto. If so inclined it can "put the governor in a hole." The governor can do just one thing to block such a game, and that is to veto the entire budget bill; but since the state government must go on, he will hesitate greatly to exercise this power. What he is likely to do is to sign the bill and then blame the legislature for the large appropriations; but this means a return to the old system of "back passing" which the budget system was designed to eliminate. Important under any system of appropriations, the item veto is absolutely indispensable to the successful operation of the Wisconsin budget plan, in which all appropriations are to be made in a single bill.

(2) *The executive veto of items in appropriation bills, as proposed in Wisconsin, does not invade the proper sphere of the legislature.* Under the proposed Wisconsin amendment, the governor's veto of items in appropriation bills is not final. Such vetoes go back to the legislature, and if the appropriations are repassed by a two-thirds vote in both houses they become law despite the governor's objections. Unlike some states which have the executive veto of items in appropriation bills, the Wisconsin amendment does not allow the governor to reduce items, but only to veto them entirely, and then send them back to the legislature which may pass the same over the veto. Moreover, the Wisconsin budget law provides that the executive budget bill shall be introduced at the very opening of the session, and that this bill must be passed before any other

appropriation measure can be passed. These provisions insure, that the legislature will have ample opportunity to pass any item in the budget bill vetoed by the governor, which two-thirds of the members of both houses deem necessary.

This proposal puts both the governor and the legislature in the position in which the constitution intended they should be with reference to the appropriations. The legislature holds the purse strings, but cannot play politics with appropriations or "put the governor in bad." The governor is given a genuine veto power with regard to appropriation bills, as with reference to all other bills. He cannot dictate appropriations, but has his constitutional power to block any appropriation which he deems unwise and which two-thirds of the members of both houses do not think ought to pass over his objections.

(3) *This proposal is not revolutionary but is in successful operation in the great majority of the states of the union.* Thirty-seven states now provide in their statutes that the governor may veto items in appropriation bills. These states are as follows: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wyoming.

In many of these states provisions for the governor's veto of items in appropriation bills have been in force for a long time; in most of them they have come in with the adoption of a budget system. No state which ever had such a provision in its constitution has ever dropped the same.

(4) *This proposal will operate for harmony and avoid expensive deadlocks between the governor and the legislature.* Without the power to veto items in appropriation bills, a hostile majority in the legislature can "frame" the governor, and under such circumstances a governor with stamina is bound to fight back. The result is endless friction and a possible deadlock, completely crippling the state government.

The inability of the governor to veto items in appropriation bills has already proved expensive to Wisconsin. In the 1927 session of the legislature the governor objected to the inclusion of certain appropriations for new buildings in the normal school appropriation bill, and, also, objected to a few items in the so-called "Board of Control Bill," making appropriations to the charitable and penal institutions. As the governor could not veto the particular items to which he objected, he vetoed both of these bills, although he approved of over 90 per cent of the items therein. These two vetoes necessitated the two special sessions held in 1928, which cost the state about \$18,500 for the legislature alone. A further result of these vetoes was that in the end neither the normal schools nor the state charitable and penal in-

stitutions got any capital appropriations for these two years, which is an important item in the accumulation of building needs at the state institution which is now so acute.

(5) *This proposed amendment, if adopted, will result in reduced State expenditures.* This is done on the theory that when the people know who is responsible for appropriations and expenditures, there will be less waste of public moneys. If the governor is given the power to veto items in appropriation bills, complete responsibility for appropriations and expenditures is centered in him. Unquestionably this will result in the greatest caution to avoid unnecessary public expenditures. In all states in which the governor has the power to veto items in appropriation bills, he exercises this power in numerous cases each legislative session, saving thousands of dollars annually to the people.